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No. 87-2051

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1989

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M.J.R., INC., et al.,

Petitioners,

vs.

CITY OF DALLAS, et al.,

Respondents.

—o—

On Writ Of Certiorari To The
United States Court of Appeals
For The Fifth Circuit

—o—

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF OF PETITIONERS M.J.R., INC., et al.

—o—

JOHN H. WESTON*
G. RANDALL GARROU
CATHY E. CROSSON
WESTON & SARNO
433 N. Camden Dr., Suite 900
Beverly Hills, CA 90210
(213) 550-7460

RICHARD L. WILSON
3610 Dubsdread Circle
Orlando, FL 32804
(407) 648-9129

Attorneys for Petitioners

*Counsel of Record

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Pursuant to Rule 35.5 of this Court, petitioners seek leave to file the attached Supplemental Brief following the argument of this case on October 4, 1989.

Petitioners submit this Supplemental Brief solely in order to provide a more complete answer to an unexpected question from the Court near the end of counsel's allotted time for argument. Specifically, Justices Kennedy, Scalia and O'Connor asked counsel whether the

Constitution would permit a legislature to authorize disqualification of a bookstore or other speech-related business for a license as part of a sentence for a criminal offense.

Petitioners' counsel wishes to supplement his response to that question, as the answer originally given was incomplete, and thus misleading as to petitioners' actual position, due to the expiration of counsel's time. Because this issue is critically important to the doctrine of prior restraint, counsel respectfully urges the Court to allow the filing of this supplemental brief, which will provide a more developed response to the Court's inquiry and should correct any misimpression of petitioners' position which might have been conveyed.

October 19, 1989

Respectfully submitted,

JOHN H. WESTON*
G. RANDALL GARROU
CATHY CROSSON
WESTON & SARNO

RICHARD L. WILSON

Attorneys for Petitioner
*Counsel of Record

Constitution would permit a legislature to authorize disqualification of a bookstore or other speech-related business for a license as part of a sentence for a criminal offense.

Petitioners' counsel also failed to supplement his response to that question, as the Court originally gave him incomplete, and thus misleading as to petitioners' actual position, due to the expiration of counsel's time. Because this issue is critically important to the doctrine of prior restraint, counsel respectfully urges the Court to allow the filing of this supplemental brief, which will provide a more developed response to the Court's inquiry and should correct any misimpression of petitioners' position which might have been conveyed.

October 19, 1989 Respectfully submitted,

JOHN B. WEST*
G. RANDALL GARROU
CATHY CROSSON
WESTON & GARROU

RICHARD I. WILSON

Attorneys for Petitioner

*Counsel of Record

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JOHN H. WESTON*
G. RANDALL GARROU
CATHY E. CROSSON
WESTON & SARNO
433 N. Camden Dr., Suite 900
Beverly Hills, CA 90210
(213) 550-7460

RICHARD L. WILSON
3610 Dubsdread Circle
Orlando, FL 32804
(407) 648-9129

Attorneys for Petitioners

*Counsel of Record

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SUPPLEMENTAL BRIEF
OF PETITIONERS M.J.R., INC., et al.

JOHN H. WESTOOK*
G. HANCHEL CARPOO
CATHY J. CROSSON
WESTOOK & BAYNO
433 N. Camden Dr., Suite 900
Beverly Hills, CA 90210
(213) 550-7460

RICHARD L. WILSON
3810 Occidental Circle
Orlando, FL 32804
(407) 648-9129

*Counsel of Record

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SUPPLEMENTAL BRIEF

In oral argument, Justices Kennedy, Scalia and O'Connor asked counsel whether the Constitution would permit a court or legislature to authorize the withholding of a license for a bookstore or other speech-related business as part of a sentence for a criminal offense. Because the answer to that question is pivotal to a proper analysis of the critically important prior restraint issues in this case, petitioners submit the following supplemental response.

Depending upon whether the predicate crime is a speech offense or a non-speech violation, a sanction expressly prohibiting future, presumptively-protected speech is a prior restraint and either per se invalid under the rule of Near v. Minnesota, or subject to the strictest First Amendment scrutiny. There is a profound constitutional difference, from the perspective of free speech, between an ordinary criminal sanction such as incarceration, and a remedy which operates directly to suppress future expression. Any governmental edict,

SUPPLEMENTAL BRIEF

"Thou shalt not speak," must always be subject to the strict scrutiny of the First Amendment as most elementally envisioned by the Framers and as consistently interpreted by this Court.

Although incarceration has an undeniable incidental impact on expression, that impact is an indirect prohibition on speech, not a direct restraint. The primary effect of a jail sentence is simply punishment of a person, not the prospective suppression of expression. This is the pivotal distinction proclaimed in Near v. Minnesota, 283 U.S. 697, 710-712 (1931):

> "The object of the statute [allowing injunctions against future publications] is not punishment in the ordinary sense, but suppression of the offending newspaper or periodical. The reason for the enactment, as the state court has said, is that prosecutions to enforce penal statutes for libel do not result in 'efficient repression or suppression of the evils of scandal.'" 283 U.S. at 711.
>
> * * *
>
> "This suppression is accomplished by enjoining publication, and that restraint is the object and effect of the statute." Id. at 712.

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* * *

> "This suppression is accomplished by enjoining publication, and that restraint is the object and effect of the statute." Id. at 713.

In Near, the State banned future publication on the basis of past speech violations. This Court, concluding such prospective injunctions triggered by speech offenses are the purest and most constitutionally objectionable form of prior restraint, facially invalidated the statute. As the Court later summarized Near in Kingsley Books v. Brown, 354 U.S. 436, 445 (1955):

> "Minnesota empowered its courts to enjoin the dissemination of future issues of a publication because its past issues had been found offensive . . . . 'This is of the essence of censorship.'" (Quoting Near, 283 U.S. at 713.)

Thus emerged a cornerstone rule of First Amendment law which should be seen as the essence of Near: a prohibition against unknown, presumptively-protected expression in the future, as a remedy for past speech offenses, is barred by the First Amendment. The Court in Near determined that such sanctions are inherently an overbroad and impermissible means

of addressing past speech abuses. This rule must apply regardless of the form in which government structures the remedy -- whether it seeks to impose an injunction as in Near, the probationary term contemplated by the Justices' questions, or the license disqualification directly at issue in this case.

If Near's distinction between traditional punishment (which only indirectly restrains speech) and sanctions which directly suppress expression were not the law, the First Amendment would provide little protection from a government hostile to one's speech. For example, a state could require all newspapers to obtain a license, and could revoke that license if the newspaper ever published a defamatory article.

This case, of course, also involves prior restraints of a different type: license disqualifications based on non-speech predicate conduct. Where the sanction denying licensure or otherwise expressly prohibiting future free-speech activity is based upon a finding of

unlawful non-speech conduct, the mode of analysis shifts from Near's per se rule to strict scrutiny. Any attempt to directly restrain or prohibit a citizen's future exercise of free speech requires the most compelling justifications to overcome the "heavy presumption against its constitutional validity" which any prior restraint brings to this Court. As eloquently stated by the Fifth Circuit Court of Appeals in Fernandes v. Limmer, 663 F.2d 619, 629-630 (1981), "Persons with prior criminal records are not First Amendment outcasts." Although certain prospective speech-inhibiting sanctions might conceivably withstand the glare of strict scrutiny, this Court has found virtually all such prior restraints unconstitutional.[1]

Prior restraint analysis is required, then, whenever the challenged sanction imposes a direct rather than an indirect restraint on expressive activity. The Court recently

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[1]See the voluminous cases cited in footnote 12 of the Brief of Petitions (M.J.R., et al.) at 25-29.

underscored this "direct vs. indirect" distinction in Arcara v. Cloud Books, 478 U.S. 697 (1986). In Arcara, non-speech criminal activity triggered the in rem closure of a particular location, which incidentally was a bookstore. The padlocking of the premises had an indirect impact upon expression, but imposed no direct restraint upon speech activity (which the proprietors were free to resume at any other location). Accordingly, it was not subject to prior restraint analysis. Had the order specifically forbidden bookselling at the offending location or elsewhere, it would have been a direct prior restraint on speech and thus subject to strict scrutiny.

Two hypotheticals prove the necessity of adhering to prior restraint analysis in the context of laws such as Dallas' which would revoke licenses to engage in speech.

(1) Suppose Martin Luther King were arrested on breach of the peace charges arising from a civil rights march, convicted and placed on probation with the condition that he not

participate in any demonstrations for five years.

(2) New York revokes the newspaper license of the Wall Street Journal because the company is one day late in payment of its sales taxes, or because unknown to its management, an employee has traded upon insider information.

These examples demonstrate the tremendous tool for censorship which such overbroad direct prior restraint remedies would place in the hands of government officials. These remedies are precisely analogous to the term of probation contemplated by the Justices' questions, and of more direct relevance, to the license disqualifications imposed by this inevitably censorial Dallas ordinance.

The questions posed by Justices Kennedy, Scalia, and O'Connor, whether courts and/or legislatures may constitutionally impose a prospective ban on speech as a condition of probation, must be analyzed under the doctrine of prior restraint. Petitioners wish to make clear their unequivocal position that such a

participate in any demonstrations for five years.

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Those examples demonstrate the tremendous tool for censorship which such overbroad direct prior restraint remedies would place in the hands of government officials. These remedies are precisely analogous to the term of prosecution contemplated by the Justices' questions, and of both direct reliance, to the license disqualifications imposed by this invidiously censorial Union tax regime.

The questions posed by Justice Kennedy, Scalia, and Chief Justice Burger, courts and/or legislatures may constitutionally impose a prospective ban on speech as a condition of probation, must be analyzed under the doctrine of prior restraint. Petitioners wish to make clear their unequivocal position that such a

probationary term would be presumptively unconstitutional, even where predicated on non-speech offenses. Unlike a jail sentence, such a probationary term would directly restrain expression and its primary object and effect would not be punishment but rather the suppression of speech. Accordingly, it would come to this Court with a heavy presumption against its validity.

CONCLUSION

The distinction between criminal punishment which may indirectly affect speech, and other governmental actions or laws which directly suppress expression, is essential to this Court's analysis of the prior restraint challenged in this case. If the prior restraint doctrine is to retain any real vitality in defense of First Amendment freedoms, this Court must continue to recognize that a law's

characterization as "subsequent punishment" is meaningless where its direct operation and effect is the immediate suppression of speech.

October 19, 1989

Respectfully submitted,

JOHN H. WESTON*
G. RANDALL GARROU
CATHY CROSSON
WESTON & SARNO

RICHARD L. WILSON

Attorneys for Petitioners

*Counsel of Record